

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CENTRAL LABORERS' PENSION :

4 FUND , :

5 Petitioner :

6 v. : No. 02-891

7 THOMAS E. HEINZ, ET AL. :

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9 Washington, D.C.

10 Monday, April 19, 2004

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:08 a.m.

14 APPEARANCES:

15 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 JOHN P. ELWOOD, ESQ., Assistant to the Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioner.

21 DAVID M. GOSSETT, ESQ., Washington, D.C.; on behalf of the
22 Respondents.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-891, the Central Laborers' Pension Fund v. Thomas E. Heinz.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Thank you, Mr. Chief Justice, and may it please the Court:

This is an ERISA pension case. The petitioner is a multiemployer pension plan. The respondent plaintiffs are two plan participants. Each accrued a pension and took early retirement at age 39, and each claimed a full pension in the form of a life annuity.

At issue in the case is a plan amendment. It authorizes the suspension of retirees' benefit payments during the time that they choose to go back to work as construction supervisors. Before the amendment, suspension was triggered only by work as a construction laborer.

The change gives rise to an important, albeit highly technical, question about the relationship between two provisions of ERISA. The question is: may such an amended employment suspension provision apply to

1 previously accrued benefits? The plan says the answer is
2 yes; the participants say the answer is no.

3 The expert agencies charged by Congress with
4 administering ERISA have also spoken to the question.
5 They say that ERISA does authorize such an amendment, and
6 they reached that conclusion by construing the two ERISA
7 provisions in para materia.

8 Countless pension plans around the Nation, in
9 turn, have relied on the agencies' guidance in shaping
10 their plan amendments for decades, and that is the
11 principal reason that the case is so important.

12 QUESTION: In the -- in the guidance that is
13 given, does the -- has the IRS actually passed on
14 particular amendments?

15 MR. GOLDSTEIN: It has, not in formal guidance.
16 The process is that you can --

17 QUESTION: How does it do it?

18 MR. GOLDSTEIN: There -- there are a couple of
19 layers of it. The first is that the IRS publishes
20 guidance ahead of time. For about 2 decades, there has
21 been something called the LRM, the List of Required
22 Modifications. It's quoted in -- it's quoted in the
23 Government's brief in particular. And that said to plans,
24 if you're going to adopt a plan or revise a plan, here's
25 what you can do.

1 QUESTION: Is this in the manual?

2 MR. GOLDSTEIN: Then there's a second. The
3 second step is that more recently they have published
4 what's known as to IRM, the Internal Revenue Manual, and
5 that's guidance for IRS employees.

6 And then there's a third level, and that is
7 plans can submit their plan provisions and amendments to
8 the IRS for what are known as determination letters on
9 which the IRS signs off. And so all three of those exist.

10 QUESTION: Do we -- do we have any indication of
11 how many determination letters have been issued?

12 MR. GOLDSTEIN: We don't. I don't think that
13 the IRS was able to come up with a particular number, but
14 they did say that their consistent practice for decades
15 has been to approve this particular --

16 QUESTION: Is there anything to document that,
17 that it's been for decades? I mean, the manual provisions
18 and the rest of -- of what you're describing is not -- not
19 published. So where do we get the 2 decades from?

20 MR. GOLDSTEIN: We get that from, I guess, two
21 sources. The first is that there is the document -- the
22 -- the series of documents known as the LRM, the List of
23 Required Modifications, that has guided the plans for a
24 couple of decades, and it does not restrain plans in its
25 -- it specifically addresses revisions to plans,

1 amendments, and it doesn't say that you can only apply it
2 a suspension provision to benefit payments that accrue in
3 the future. Beyond that, when it comes to, you know, what
4 the IRS does day in and day out, we just have their
5 representation.

6 QUESTION: Well, do you -- does -- does the list
7 specifically say that the amendments can -- can relate --
8 can, in fact, relate to or in law relate to prior
9 accrued --

10 MR. GOLDSTEIN: No, it doesn't. There --

11 QUESTION: So, it leaves that question open.

12 MR. GOLDSTEIN: It -- it -- literally in its
13 text it does, but as a practical matter it doesn't
14 because, as I was saying to Justice Ginsburg, the LRM's
15 have addressed revisions to plans and to amendments, and
16 they haven't restrained in any way the ability to apply it
17 to previous --

18 QUESTION: But that's a pretty negative
19 inference, isn't it?

20 MR. GOLDSTEIN: It's true, but the -- the way
21 these documents work, as I understand them, is that if
22 there's a restriction, something you can't do, they say it
23 expressly. When you -- remember, the default rule under
24 ERISA, of course, is that you are allowed to adopt a plan
25 amendment, and then the -- they -- they articulate

1 particular restrictions --

2 QUESTION: So I -- I think it's pretty explicit
3 when it says that the accrued benefit of a participant
4 under a plan may not be decreased by an amendment of the
5 plan.

6 And I don't -- the trouble I'm having is it just
7 seems to me utterly unrealistic to say that his accrued
8 benefit has not been decreased when he used to be able to
9 work as a -- as a supervisor and continued to draw from
10 the plan. Now he cannot work as a supervisor. How can
11 you -- I mean, certainly if you placed a dollar value on
12 his right to receive money from the plan, you would -- you
13 would put a higher price on -- on the -- the individual
14 who has the right to work as a supervisor and still
15 continue to draw money as opposed to the person who
16 doesn't have that right. I mean, the -- the language just
17 seems to me utterly plain.

18 MR. GOLDSTEIN: The -- Justice Scalia, the
19 reason that the IRS has reached the opposite conclusion
20 for decades is threefold, and I will focus on the text
21 because that's where you focus. But just to lay them out,
22 it's going to be the text, the purposes of the suspension
23 provision, which is section 203(a)(3)(B), and what will
24 best protect participants' expectations. You focus
25 rightly on the text.

1 The -- the key is what is a benefit versus what
2 is a suspension of benefit payments. As I said in the
3 introduction, the plan participants here earned a benefit
4 and that is a life annuity in a service only pension. So
5 they were able to retire and they got a life annuity
6 that's available to them.

7 QUESTION: It's the dollar amount that they're
8 entitled to which is the benefit.

9 MR. GOLDSTEIN: It is --

10 QUESTION: But that means you can say, well, you
11 know, they're still entitled to that dollar amount, but
12 they can only get it every other year.

13 MR. GOLDSTEIN: That would be prohibited.

14 QUESTION: Would that limitation be okay?

15 MR. GOLDSTEIN: No, it wouldn't because it would
16 violate the vesting rules.

17 Let me continue. There are two parts in ERISA,
18 and this is set out in your Alessi opinion in 1981. You
19 have to accrue a benefit and then you vest in the benefit.
20 The accrual is when you've earned the benefit. They
21 earned the benefit. They earned their pension. Then they
22 had to vest in it; that is, though they've earned it, they
23 have what Alessi calls a non-forfeitable right to claim
24 it. And what a suspension provision does it says your
25 benefit still exists. Their benefit is a life annuity.

1 It exists. There is an available stream of payments.
2 There's a stream of payments that is available every
3 single month. That's the accrual rule.

4 Then you have to vest. You have to have a right
5 to claim it, and that's what a suspension provision does.

6 QUESTION: It's not you that vests. It's the
7 pension that vests, isn't it?

8 MR. GOLDSTEIN: It is your claim to it that
9 vests, Mr. Chief Justice. If I could give you the
10 language --

11 QUESTION: Well, I was just questioning your
12 choice of words.

13 MR. GOLDSTEIN: I apologize. What I had
14 intended to say is that your claim to it vests. There is
15 a benefit out there, this life annuity. And the question
16 is: do you have the right to claim it in any particular
17 month? That's the structure of section 203 versus section
18 204.

19 And what a suspension provision does -- and let
20 me just pause to say the court of appeals acknowledged,
21 the plaintiffs acknowledged, that when we suspend their
22 benefit payments, we are not decreasing their benefit.
23 What we're doing is that they have sacrificed their claim
24 to a particular benefit in any given month. That's why
25 Congress used the different language, suspension of

1 benefit payments versus the actual decrease in the
2 benefit.

3 QUESTION: Well, they concede that with respect
4 to the -- the decreases that were a term of the plan when
5 it accrued to them.

6 MR. GOLDSTEIN: Well, they conceded --

7 QUESTION: They don't concede anything more, do
8 they?

9 MR. GOLDSTEIN: No, but the concession is,
10 nonetheless --

11 QUESTION: Well, that's no concession.

12 MR. GOLDSTEIN: Well, it is we think, Justice
13 Souter. Here's why. What I think Justice Scalia was
14 focusing on -- and I may be mistaken -- is that, look,
15 when you withhold that benefit payment, sort of give me a
16 break. They're not getting the money. You're decreasing
17 their benefit. And in the terminology of ERISA, that is
18 actually not correct.

19 QUESTION: No. That wasn't my point at all. My
20 -- my point, which I took a long time to make, was that
21 the value of your right to money, even though you work as
22 a supervisor, is greater than your right to money which
23 terminates as soon as you begin to work as a supervisor.
24 It's a less valuable benefit.

25 MR. GOLDSTEIN: Fair enough.

1 QUESTION: And that comes right within the
2 language. The accrued benefit may not be decreased by an
3 amendment.

4 MR. GOLDSTEIN: And here is why it does not.
5 The real-world value, the sense that, look, this is more
6 desirable. I would rather have a benefit that has less
7 suspension provisions than one that has more. For
8 example, hey, it's more likely I'm going to get the money.
9 That is not a benefit within the meaning of ERISA. The
10 benefit is the life annuity. It's a -- this is -- the --
11 ERISA is, of course, as you've often said, a highly
12 reticulated statute. There are 3,978 pages of regulations
13 implementing it in about 6-point font. The terms of art
14 are highly, highly technical, and the benefit is the life
15 annuity. It's not just the sense that I like it more.
16 And I can give you an example.

17 Section 203(c) of ERISA -- and, Mr. Chief
18 Justice, that is reproduced in the yellow brief. I don't
19 think it will be necessary for the Court to track it, but
20 it is at the bottom of 4a and 5a. This is a -- of the
21 yellow brief. And this is a provision under which plans
22 are authorized to change their vesting schedules. And so,
23 take an example.

24 There are two ways you can vest under ERISA.
25 One if over the course of 7 years in individual steps.

1 Another is so-called cliff vesting, and that is, you've
2 got your benefit. You've earned it, but until you've been
3 in service for 5 years, you don't have any legal claim to
4 it notwithstanding that it's out there. Plans under
5 section 203(c) are allowed to change their vesting rules
6 so that if someone had earned 2 years of vesting credit,
7 the plan can, nonetheless, change to a 5-year cliff
8 vesting provision. Now, that's all very complicated, but
9 the bottom line is that it makes it less valuable in the
10 real-world sense for the plan participants.

11 QUESTION: Yes, but that -- that speaks to the
12 future effect of such an amendment, and it -- when you're
13 talking about getting vesting, you can't have a
14 retroactive -- you would not already be vested. Does that
15 mean that if somebody vested after 2 years, they could
16 then adopt an amendment saying henceforth it's got to be 5
17 years and that applies to somebody who is already vested?

18 MR. GOLDSTEIN: Unquestionably, yes.

19 QUESTION: Does it really.

20 MR. GOLDSTEIN: Absolutely, yes, without any --
21 any doubt whatsoever.

22 QUESTION: And what is the authority for that?

23 MR. GOLDSTEIN: That is section 203(c). Section
24 203(c) explains that if you have less than 3 years of
25 service, you are not allowed to object to the change in

1 vesting conditions. There are rules under ERISA that say
2 that even though you've vested, you can, in effect, be
3 divested. That's why it is a very strange structure of
4 the --

5 QUESTION: Well, they -- they wouldn't need that
6 provision if the principle of law that you're urging upon
7 us existed. I mean, the -- the whole reason, it seems to
8 me, that they had to make that clear in a statutory
9 provision is that without it, you would obviously be
10 decreasing the value of the plan and violating the
11 provision of whatever it is, 1054(g)(1).

12 MR. GOLDSTEIN: No. That's why this is in 1053.
13 There are two sets of restrictions. That provision that
14 I've just been describing would not -- and I don't think
15 there's anybody who really contends it would -- violate
16 1054, what we've been calling 204. It would violate 1053.
17 You have --

18 QUESTION: Which -- which part of 1053?

19 MR. GOLDSTEIN: It would violate the beginning
20 of 1053, Mr. Chief Justice. Let me take you to 1a of the
21 yellow brief, and the paragraph involved would be 1 --
22 excuse me -- 1053(a)(2)(A) and (B). Those are the
23 places --

24 QUESTION: Okay. Read them please.

25 MR. GOLDSTEIN: Yes, Mr. Chief Justice. The

1 beginning of (2) says, except as provided in paragraph 4,
2 which is not relevant, a plan satisfies the requirements
3 of this paragraph if it satisfies the requirements of
4 subparagraphs (A) or (B). And subparagraphs (A) or (B)
5 which I'll read, give you that 5-year cliff vesting option
6 or instead over the course of 7 years. A plan satisfies
7 the requirements of this subparagraph if an employee who
8 has completed at least 5 years service has a non-
9 forfeitable right to 100 percent of the employee's accrued
10 benefit derived from employer contributions. And then (B)
11 is the other option, the 7 years.

12 Now, I have spoken and I've tried to emphasize
13 the difference between a benefit and the suspension of
14 benefit payments, but it is also important to deal with
15 the two other reasons that the Government --

16 QUESTION: Let me just be sure I understand that
17 argument again, Mr. Goldstein. This says you, in effect,
18 can retroactively require a longer vesting period. That
19 would mean require a longer period before you acquired an
20 accrued benefit.

21 MR. GOLDSTEIN: No.

22 QUESTION: That was 20 -- isn't that right?

23 MR. GOLDSTEIN: No, Justice Stevens. You would
24 acquire the accrued benefit under 1054 as it accrued over
25 time. What you would not do is vest in that benefit, your

1 right to the benefit is not present.

2 QUESTION: So accrued -- the term, accrued
3 benefits, applies to benefits that have not yet vested.

4 MR. GOLDSTEIN: That's exactly right.

5 QUESTION: I see.

6 MR. GOLDSTEIN: Yes. Let me just step back.

7 QUESTION: I'm not sure that -- I'm not sure I
8 understand that, but anyway, go ahead.

9 MR. GOLDSTEIN: I apologize. Let me just step
10 back and explain it then. There are two things that you
11 have to do in order to be able to collect your benefit
12 under ERISA. It has to accrue. You have to earn it under
13 1054.

14 QUESTION: Right.

15 MR. GOLDSTEIN: And you also have to vest in it
16 under 1053.

17 Justice Scalia, you had intimated a
18 hypothetical. Well, look, couldn't the plan just say,
19 hey, we're suspending your benefit payments and wouldn't
20 that violate 1054 because you lessened the value of the
21 benefit. The answer to that question is no. You couldn't
22 do it, but -- because it would violate 1053. Someone
23 would have vested in the benefit and you would be
24 divesting them of it.

25 Let me also take you -- because we do contend

1 that we are entitled to --

2 QUESTION: Vesting means --

3 QUESTION: You're going pretty fast for me.

4 MR. GOLDSTEIN: Sorry.

5 QUESTION: Could I just make sure I understand
6 one thing?

7 MR. GOLDSTEIN: Yes.

8 QUESTION: You're saying that a delay in the
9 period between the time a benefit accrues and when it
10 vests is not covered by 204(g), but a reduction of a
11 benefit that has already both accrued and vested is -- is
12 not covered by it or is -- you're saying they're the same.
13 That's what you're saying --

14 MR. GOLDSTEIN: Let me --

15 QUESTION: -- for purposes of --

16 QUESTION: Answer the question.

17 QUESTION: Yes.

18 MR. GOLDSTEIN: No is the -- is the short answer
19 and here's the longer answer. You cannot decrease the
20 benefit even if it has not yet vested. Let's be perfectly
21 clear. If I -- they have a life annuity and I were to say
22 instead of paying you \$1,650 a month, I'm going to pay you
23 \$1,400 a month, notwithstanding that they haven't vested
24 in it, it still violates the accrual rule.

25 But when you come to the question of the

1 suspension of benefit payments, which throughout ERISA is
2 a different concept than a decrease in benefits, when you
3 come to a suspension -- that is, your -- your claim to the
4 benefit payment each month -- I'm taking that away from
5 you -- that's covered by 1053. And our point is that this
6 plan amendment is -- and the Government agrees -- is
7 authorized by 1053.

8 I had said that I was also going to go beyond
9 the -- move from the text to the purposes underlying the
10 statute and the protection of participants' legitimate
11 expectations.

12 But before doing that, I do want to point to the
13 regulation, Justice Scalia, that addresses our
14 understanding of what it is to decrease, and we contend
15 that the regulation, which is published after notice and
16 comment, is entitled to Chevron deference. And it is --
17 is reproduced on page 8a of the yellow brief, and I will
18 just -- it's quoted in our brief as well. And it explains
19 that a decrease in a benefit is something that changes the
20 computation of the benefit. This does not change the
21 computation of the benefit. It's not just a rhetorical
22 device. It is a theme that runs throughout the provisions
23 of ERISA.

24 Briefly, with respect to the purpose of the
25 statute and plan's expectations, the critical point is

1 that the suspension rule cannot work if it -- this is
2 section 203(a)(3)(B), the 1053 provision -- cannot work if
3 it does not apply to already accrued benefits. The point
4 of the statute is to get people to move in and out of the
5 workforce. And if you are not allowed to apply your
6 suspension provision to existing retirees, you cannot
7 influence them in response to current financial
8 conditions, the shape of the construction labor market,
9 the shape of the current trucking market. You have to be
10 able to influence their decision whether or not to work or
11 not to work.

12 QUESTION: Well, that -- that as set forth in --
13 in your brief and -- and you made it sound like a very
14 significant, very important power, but also you made it,
15 to me, sound like it -- it gives almost no effect at all
16 to the anti-cutback provisions.

17 MR. GOLDSTEIN: It does --

18 QUESTION: I mean, this -- this is a sweeping
19 authority you're arguing for on behalf of the plaintiff.
20 Oh, the economy is this way and that way.

21 MR. GOLDSTEIN: Well, I think the critical point
22 is that Congress in section 1053, in 203, carefully
23 limited the power of the plans; that is, it's -- the right
24 here is to receive your pension. That right is completely
25 in the control of the participants. They can choose not

1 to go back to work or to go back to work. They will
2 receive their benefits.

3 In addition, the plan is only allowed to limit
4 the receipt of the benefit payment during periods of
5 reemployment in the same industry, trade, or craft in the
6 same geographic region only if they work more than 40
7 hours of -- a month, and a variety of other restrictions.
8 And those showed that Congress was cabining the authority
9 of plans so that they didn't unduly restrict the ability
10 of plan participants to go back to work.

11 But it is, I think, absolutely critical, to
12 return to the point, that 1053(a)(3)(B), the suspension
13 rule, cannot function as Congress intended and that is
14 what the IRS concluded if it does not apply to already
15 accrued benefits. We could not encourage or discourage
16 the plan participants to go back to work or not to go back
17 to work and thus calibrate the pension payments that are
18 coming into the plan if it did -- if our suspension
19 provision did not apply to their benefits.

20 If I could reserve the remainder of the time.

21 QUESTION: Very well, Mr. Goldstein.

22 Mr. Elwood, we'll hear from you.

23 ORAL ARGUMENT OF JOHN P. ELWOOD

24 ON BEHALF OF THE UNITED STATES

25 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

1 MR. ELWOOD: Mr. Chief Justice, and may it
2 please the Court:

3 For at least 20 years, the Internal Revenue
4 Service has consistently approved the amendment of pension
5 plans to add or expand disqualifying employment provisions
6 within the scope of ERISA's suspension rule, and it has
7 permitted those amendments to be applied to existing
8 benefit accruals. Over the years, literally hundreds of
9 plans have relied on the flexibility that policy afforded
10 in determining whether a plan --

11 QUESTION: Could you address one -- one question
12 I have? The fact that the -- the plan doesn't -- or the
13 contributors don't lose their tax deduction does not
14 necessarily mean that those -- that they otherwise comply
15 with ERISA.

16 MR. ELWOOD: That is -- I think that -- well,
17 actually I think that because the -- the qualification
18 provisions are coextensive with the ERISA provisions, that
19 I think that they rise or fall together.

20 QUESTION: Have we ever said that?

21 MR. ELWOOD: I think that the -- the -- thing is
22 the language of the -- the provisions is substantially
23 identical. The wording is -- is basically exactly the
24 same. And so I don't know that there has been a -- a case
25 on point that says they could be construed differently,

1 but I think there would be an uphill road.

2 QUESTION: The Treasury Department, of course,
3 is interpreting -- is interpreting the statute for the
4 purpose of deciding whether -- the income tax consequences
5 of contributions basically.

6 MR. ELWOOD: That is correct, but they have been
7 vested under reorganization plan number four with the
8 authority to construe the exact same provisions, the
9 corresponding provisions of title I of ERISA that we're
10 talking about here. And in -- when they issue those
11 regulations, they typically say we're construing both. We
12 use the code verbiage, but we're construing both.

13 QUESTION: The thing that runs through my mind
14 is I'm not sure they have the same expertise, for example,
15 as if the Department of Labor had to give them the same --
16 same answer to this question.

17 MR. ELWOOD: They have been charged with
18 interpreting these provisions, the same provisions of
19 title I of ERISA, the 204, 203 here as in the
20 corresponding provisions of the code. And it would be our
21 position that they're just as expert because they're
22 exactly the same the language --

23 QUESTION: But the concern at issue in this case
24 is the ability of people to move in and out of the -- out
25 of the trade, which is specifically a Labor Department

1 interest. The Labor Department would be more interested
2 in ensuring that -- that interest is preserved than the
3 Treasury Department would.

4 MR. ELWOOD: In any event, the -- the Department
5 of the Treasury has been charged with the responsibility
6 and because it's identical language, we would argue that
7 they're entitled to just as much reference under that as
8 under title I of ERISA --

9 QUESTION: And the -- the Labor Department has
10 not adopted a position on this question --

11 MR. ELWOOD: The Labor Department agrees with
12 this position. The Labor Department, again under internal
13 executive branch orders, is bound by the IRS
14 determinations in this regard.

15 Now, if I could get back to --

16 QUESTION: Now, may I ask you about section 203?
17 Because the respondent says it governs only normal
18 retirement benefits and not early retirement benefits that
19 are at issue here.

20 MR. ELWOOD: It governs normal benefits and
21 their actuarial equivalents. So to the extent that early
22 retirement benefits are the actuarial equivalent of normal
23 retirement benefits, just reduced to account for the fact
24 they're received earlier and that they'll be received over
25 a longer period, it applies of its own force.

1 But again, the -- the Department of the Treasury
2 has taken the purposes of 203 into account when it
3 construes all of the remaining provisions.

4 Justice Souter --

5 QUESTION: May I ask you to -- to comment on an
6 argument that Mr. Goldstein just made? His -- his
7 argument was that, at least certainly so far as the
8 construction industry is concerned, unless this kind of
9 retroactive effect could be given, there -- the -- the
10 various plans could not protect themselves, or at least
11 they -- they could not take account of -- of labor market
12 conditions. It would be useless to.

13 My question is assume that is so. ERISA is made
14 for all sorts of plans. It isn't just made for the
15 construction industry. Is there any reason to believe
16 that Congress was concerned with the construction
17 industry's labor market problems in -- in fixing the --
18 the statute in the way Mr. Goldstein and you say it has
19 been arranged?

20 MR. ELWOOD: I think there is reason to believe
21 that Congress was concerned with the cyclical nature of
22 industries for which market -- which are covered typically
23 by multiemployer plans.

24 QUESTION: How do we -- how do we know that? In
25 other words, how do we know that this argument is not the

1 tail wagging the dog?

2 MR. ELWOOD: I think two things. First of all,
3 Congress -- several Members of Congress, everyone who
4 spoke to the subject during the debates leading up to the
5 passage of ERISA, indicated that the idea here was to
6 promote industrial stability and to give plans the
7 flexibility, when market conditions warranted, to adopt
8 suspension provisions.

9 QUESTION: Well, but you don't -- we don't have
10 to adopt your provision to -- to accord that flexibility.
11 All that's needed is that the plan state, when it is
12 established, that these provisions dealing with where you
13 can work are amendable. Once it says that, then there's
14 no reduction in the value of -- of the benefits that the
15 employee receives. I mean, it's -- it's just very clear
16 from the outset that these things are subject to
17 defeasance. All we're talking about is a plan that
18 doesn't contain that provision at the outset, and then
19 later decides it wants to change its mind.

20 MR. ELWOOD: Actually, Justice Scalia, it I
21 think explicitly indicates that it contemplates that. If
22 you look at pages J.A. 46 and 64, there are places there
23 saying that basically if there are material changes in the
24 suspension provisions, that the plan will notify
25 participants of them. And so between that and the fact

1 that the plan itself specifically states on page 50, J.A.
2 50, that the plan is amendable --

3 QUESTION: Yes, but that --

4 QUESTION: Okay. You're referring to J.A. 50.
5 Give us a minute, if you're --

6 MR. ELWOOD: Oh, sure.

7 QUESTION: -- if you're interested in our
8 comprehending what you're saying. Give us a minute to
9 turn to that page, will you?

10 Where on page 50 is it?

11 MR. ELWOOD: The -- page 50 is just the
12 explanation that the plan is amendable. Page 46 indicates
13 that -- that there can be change in the suspension rules.
14 It says if benefits have --

15 QUESTION: Whereabouts are you reading?

16 MR. ELWOOD: It's under (d)(1), page 46.

17 QUESTION: Okay.

18 MR. ELWOOD: (d)(1). That's the -- basically
19 the last sentence in the bottom three lines.

20 I'll begin earlier than that. It says, if
21 benefits have been suspended and payment resumed, new
22 notification shall, upon resumption, be given to the
23 participant if there has been any material change in
24 suspension rules, which we take to be an indication that
25 the plan contemplated that such amendments could be made.

1 Justice Souter, if I could --

2 QUESTION: It doesn't say anything about
3 amendments. It just says if you had a suspension, you got
4 -- you got to give notice. I don't -- I don't see that.

5 QUESTION: Presumably that -- that's a
6 suspension provided for in the plan but the plan --

7 MR. ELWOOD: No. It says if there has been any
8 material change in the suspension rules, which we think to
9 apply to changes in when a suspension can be enacted, not
10 that a suspension will be given in a particular case.

11 In addition, I just -- Mr. Goldstein has already
12 explained a bit why we think the text of ERISA supports
13 this, but I think that its purposes -- the purposes of the
14 anti-cutback rule are consistent with this because what
15 Congress was trying to protect in the anti-cutback rule
16 was reduction of retirement income. And I think that that
17 is broadly satisfied in this case because what this
18 guarantee, as we've explained, is an annuity and a certain
19 face amount that can never be reduced in face amount. And
20 the only time it is not paid to them is under very
21 narrowly cabined circumstances when they are, by
22 definition, receiving essentially receiving replacement
23 income from the same industry, the same trade or craft in
24 the same geographic area that has funded their pension
25 plan. And I think under those sort of narrow

1 circumstances, that the -- the purposes of the anti-
2 cutback rule are satisfied.

3 In addition, I would like to get back to a point
4 that Justice Souter raised.

5 QUESTION: What -- what would happen if there
6 were a -- a suspension if you were working in any other
7 industry? Suppose the plan adopted that?

8 MR. ELWOOD: I think that a plan could adopt a
9 suspension rule with respect to future plan accruals for
10 any reemployment, but it is the Government's position that
11 because what Congress is trying to control here was -- was
12 basically to give plans the flexibility so that their --
13 their participants would not have to compete or, rather,
14 have to subsidize their competitors --

15 QUESTION: But what is -- what is the provision
16 of the statute which is -- which -- on which you rest to
17 make that distinction --

18 MR. ELWOOD: That --

19 QUESTION: -- as to whether it's very important
20 for the construction industry? Suppose some plan said
21 it's for any industry.

22 MR. ELWOOD: It's for section 203(a)(3)(B), or
23 1053(a)(3)(B), which is set forth at the yellow brief on
24 page -- I think it's 1a to 2a. And there it is just -- it
25 just identifies the circumstances under which Congress has

1 authorized the suspension rule, which we read to be able
2 to be applied to existing benefit accruals. And it limits
3 it to application in the case of a multiemployer plan,
4 which we've said tend to be industries of more cyclical
5 swings, to cases where it's employment in the same
6 industry, in the same trade or craft, and in the same
7 geographic area covered by the plan.

8 QUESTION: If this is so central to your case,
9 how come it only shows up in your -- in the reply brief?
10 I mean --

11 MR. ELWOOD: No. It's cited from the outset.
12 It's just -- it's only reproduced in the reply brief. But
13 the -- but the very same provision is very central to the
14 argument set forth in both the petitioner's brief and the
15 Government's.

16 QUESTION: You -- you've been dying to respond
17 to something I raised. Let me give you the chance to do
18 it.

19 (Laughter.)

20 MR. ELWOOD: Okay. I appreciate that.

21 But I just wanted to clarify one thing about
22 what the notice of required modifications says because the
23 notice of required modifications basically sets out model
24 plan language, and the model plan language in this case
25 that existed began -- first appeared in 1984 said

1 explicitly it may be added to existing plans. And the
2 plan language itself doesn't contain any language that
3 would carve out existing accruals, so that by definition
4 it would apply to existing accruals. And I think that if
5 the Treasury had intended it to apply only to future
6 benefit accruals, it would have contained language. And
7 in fact, there are other provisions that specifically set
8 out that kind of limiting language so it can only be
9 applied to future accruals. So I'd say that. It's not --
10 I -- I think it's a -- a reasonable negative inference
11 that can be drawn from that. It's not going out on a limb
12 too much.

13 QUESTION: Mr. Elwood, you --

14 QUESTION: Thank you, Mr. Elwood.

15 MR. ELWOOD: Thank you.

16 QUESTION: Mr. Gossett, it's your turn.

17 ORAL ARGUMENT OF DAVID M. GOSSETT

18 ON BEHALF OF THE RESPONDENTS

19 MR. GOSSETT: Mr. Chief Justice, and may it
20 please the Court:

21 The Central Laborers' Pension Fund promised Tom
22 Heinz and Rick Schmitt that after they accepted an early
23 retirement package, they would be entitled to work in
24 specific jobs without sacrificing their pension plans. It
25 is a foundational principle of ERISA that participants are

1 entitled to rely on plan promises such as this one. By
2 reneging on this promise and changing the rules after the
3 fact, the plan violated section 204(g) of ERISA and
4 decreased the value of participants' plan, as Justice
5 Scalia --

6 QUESTION: Let's assume I -- I agree with you on
7 that. The -- there's -- there's another reliance problem
8 here and -- and that, I take it, is the -- is the reliance
9 upon a contrary view taken by the IRS. And the -- the --
10 your -- your colleagues on the other side say that if we
11 see it your way, there's an enormous number of plans out
12 there who are suddenly going to find themselves
13 unqualified or disqualified, whatever the term is. Is --
14 is there a way to avoid that if -- if you are correct on
15 the law, but they are correct about the -- the practice?

16 MR. GOSSETT: Yes, Justice Souter.

17 QUESTION: What part are we -- how does that --

18 MR. GOSSETT: Under Internal Revenue Code
19 section 7805(b), the IRS has the right to say that any
20 amendment before the date of this -- of this Court's
21 decision in this case wouldn't lead to a disqualification
22 of -- of the plan.

23 QUESTION: Oh, I don't think they could because
24 you have an answer there to question 6 which says that if
25 you put in your original plan a provision that would say

1 the employer can change the definition of who's working in
2 his same company over time, as labor circumstances call
3 for it, that that gives the employer discretion, and you
4 can't do it because giving them that discretion would
5 itself count as a reduction.

6 Now, that's well established. The whole point
7 of this -- so you tell me how they could write a plan to
8 do what you think they should be able to do. And of
9 course, they should. That's the whole point of this part
10 of 203.

11 MR. GOSSETT: No, Justice Breyer. The -- the
12 part -- the -- the point of 203 is not to allow plans to
13 change the rules of --

14 QUESTION: The whole point of 203, as I
15 understand it, is that it was something put in there by
16 the Teamsters or possibly the crafts unions so that when
17 you get your -- your early retirement benefit and you're
18 out there, don't come back to my plant. Why not my plant?
19 Because when you do, you will work for a low wage and that
20 will depress the wages of other workers.

21 Now, I'm not going to say absolutely never. I'm
22 not going to say always. It's going to depend on labor
23 conditions, and that's why if that purpose is not what
24 that part of 203 is there for, you can explain why it is
25 there. But if I'm right about why it's there, your

1 interpretation not only disrupts 20 years of -- of how
2 this has been administered, but also makes it unworkable.

3 MR. GOSSETT: That's not why it's there, Justice
4 Breyer.

5 QUESTION: Why is it there?

6 MR. GOSSETT: Section -- section 203(a)(3)(B),
7 for starters, only applies to normal retirement benefits.
8 Under section 203(a) of ERISA, normal retirement benefits
9 are -- cannot be forfeited. But for section 203(a)(3)(B),
10 there would be no situation in which a plan could suspend
11 benefit payments. So 203(a)(3)(B) specifies -- it
12 delimits the limited circumstances in which --

13 QUESTION: Put a little footnote here that I may
14 not agree with your statement, but go ahead.

15 MR. GOSSETT: Okay. I -- footnote noted.

16 But the point of 203(a)(3)(B) is to say that you
17 can only limit plans -- suspensions in two certain
18 circumstances. The -- if you look at the legislative
19 history of 203(a)(3)(B), though, it discusses how -- how
20 employers shouldn't be required to subsidize competitors.
21 They shouldn't be required to -- union employers should
22 not have former union workers going in for work for non-
23 union competitors at lower wages because they're also
24 receiving a pension benefit. That's what's rife
25 throughout the legislative of ERISA.

1 But there's nothing in that -- that purpose
2 which requires a plan to be able to change the rules,
3 which is what they want.

4 QUESTION: That -- that would be an odd purpose.
5 Now, wait, you're saying that the purpose of this -- I
6 have a -- a plant where I make trousers and some of my
7 workers have retired early. And you're saying the purpose
8 of this provision is to make sure that my worker who's
9 retired early doesn't go work for Justice Ginsburg's
10 plant, the trousers, some other plant. All right?

11 Now, that would be very odd to have that purpose
12 served by the language which I think says by -- that --
13 that in the case of a plan other than by an employer who
14 maintains the plan -- that is, it's talking about going
15 back to the same plant, isn't it? Am I wrong?

16 MR. GOSSETT: Well, in -- there -- there are --

17 QUESTION: They're -- they're talking about
18 going back to my plant, isn't it?

19 MR. GOSSETT: In the context of a single
20 employer plan, which is --

21 QUESTION: That's -- am I right about that?
22 It's talking about going back to my plant, not Justice
23 Ginsburg's plant.

24 MR. GOSSETT: Sorry. In the single employer
25 plan, it only limit -- it's only to prevent double -- true

1 double dipping. What double dipping is, is where you
2 accrued benefits while also receiving benefits from the
3 same plan. It's -- it's --

4 QUESTION: I thought that --

5 MR. GOSSETT: That's all you can --

6 QUESTION: -- if I've retired early and I'm an
7 expert trouser maker, I could go back to work for Justice
8 Ginsburg's plant and nobody would care as far as this
9 provision is concerned. Right?

10 MR. GOSSETT: If your pension fund was a
11 single --

12 QUESTION: Yes. It's my -- my --

13 MR. GOSSETT: -- employer pension fund. It was
14 not a multiemployer.

15 QUESTION: All right.

16 MR. GOSSETT: But in the multiemployer context,
17 it's -- it's only about cross-subsidization. But the
18 bottom line is that in either of those cases, there's no
19 reason why the pension fund -- why the -- the fund should
20 be allowed to change the rules. The -- those --

21 QUESTION: The reason is supposedly -- what they
22 say is the reason we want to change the rules is because
23 labor conditions change and whereas in this year where the
24 plant -- where the economy is booming, I don't really have
25 a problem, at least my workers don't, with retirees coming

1 back and depressing their wages.

2 QUESTION: Well, it wouldn't be changing the
3 rules, would it, if you said at the beginning these rules
4 can be changed? Isn't that all your saying, that -- that
5 the employer can do it so long as when the plan is
6 established, it is made clear that the rules can be
7 changed?

8 MR. GOSSETT: Not exactly.

9 QUESTION: Then -- then you're not changing the
10 rules when you change the rules, so to speak.

11 QUESTION: I -- I thought your brief was -- was
12 candid, Mr. Gossett, and you said you couldn't -- you
13 could not do what Justice Scalia just suggested. You
14 couldn't say up front in the plan, we can amend it anytime
15 back and forth the way we like. I thought you said quite
16 clearly in your brief that that wouldn't work.

17 MR. GOSSETT: Yes, Justice Ginsburg. I -- I
18 agree completely.

19 The -- the point is that there's no difference
20 between a plan provision that says we can change the
21 suspension rules at any point and reduce them versus a
22 plan provision that says we can reduce your benefit from
23 \$1,600 a month to \$1,400 a month at any point if we so
24 choose.

25 QUESTION: And the only --

1 MR. GOSSETT: Both of those would -- sorry.

2 QUESTION: I want to get the answer to Justice
3 Scalia's before you lose that.

4 MR. GOSSETT: This is --

5 QUESTION: Now, I thought that what he was
6 suggesting was not possible because of the reason of the
7 answer to question 6. Am I right or wrong?

8 MR. GOSSETT: The answer to question 6 in the --
9 in the regulations is a subsidiary answer. I think it's
10 by far the less important answer.

11 QUESTION: No, but I want to know first if I'm
12 right or wrong.

13 MR. GOSSETT: Yes. That is an answer is that it
14 cannot be --

15 QUESTION: I am right.

16 MR. GOSSETT: -- discretionary on the -- to the
17 plan to cut back -- to do something because of plan
18 funding.

19 But the more fundamental answer is that if that
20 were the case, every plan could include a provision that
21 said in just these words, any benefit that we've promised
22 you in this plan can be reduced at a future date at our
23 discretion. And if a plan could say that and still be
24 valid under ERISA, the anti-cutback rule would be
25 meaningless. Every plan would -- could say that.

1 So ERISA was passed specifically because
2 historically plans were pulling back benefits, relying on
3 the common law rule that a pension is simply a gratuity.
4 And the anti-cutback rule is the primary provision in
5 ERISA that was designed to say, no, when a -- a
6 participant is promised something, that promise has to be
7 kept.

8 QUESTION: Yes, but if -- if your hypothesis is
9 that even when it says they're promised nothing, in other
10 words, that they -- it can be changed retroactively --
11 you're -- you're saying that that is a promise that's not
12 kept?

13 MR. GOSSETT: That is a promise that is kept on
14 the most technical level, of course. If I'm promised
15 nothing and I'm given nothing, I -- I --

16 QUESTION: You can't complain.

17 MR. GOSSETT: -- one simply can't complain. But
18 the -- the whole goal of ERISA is to require employers to
19 say we're going to -- to say we're going to give you this
20 and -- and keep their -- their word to that.

21 QUESTION: I thought it was 203 that -- that
22 provided that guarantee. I thought it was 203 that
23 prevents you from going too far in what you say you can
24 change.

25 MR. GOSSETT: It is both 203 and 204, Justice

1 Scalia.

2 QUESTION: I don't see how 204 does it.

3 MR. GOSSETT: The -- the -- Mr. Goldstein tries
4 to differentiate 203 and 204 and argue that they're
5 completely distinct beasts, the one not affecting the
6 other. That's simply not the case. As the IRS has said
7 in its regulations, anything that indirectly decreases a
8 benefit is equally violative of 204(g).

9 And it's easy to come up with -- with plan
10 provisions that, quote, forfeit a benefit rather than
11 decrease the benefit, but which obviously reduced the
12 value you get. I mean, the most obvious example would be
13 a -- an amendment that says, each month we're going to
14 flip a coin and decide whether or not you get a check this
15 month. That benefit would be --

16 QUESTION: My -- my true question -- it isn't --
17 it isn't -- I think there's no easy answer to this case.
18 All right? And I agree with you that in ordinary English,
19 we'd call this a reduction. But there is in 203(g) -- or,
20 you know, the 203 part we're talking about -- there is an
21 obvious purpose to do something that is not consistent
22 with the normal ERISA purposes. It's right there and it's
23 done for labor reasons. And you can interpret it either
24 way.

25 So given the either-way possibility, in my own

1 mind this is where I am. I'm telling you truthfully. I'd
2 say --

3 MR. GOSSETT: Thank you.

4 QUESTION: -- either-way possibility. Well,
5 they've had this for 20 years. They have regs that are
6 consistent with it. People have lived with it. Go with
7 the administration. I mean, that's -- all right? So
8 that's -- that's where I -- that's what I -- that's how
9 I'm thinking about it, and I'd like to hear your response
10 to that.

11 MR. GOSSETT: Okay. I have several responses to
12 that because it's obviously a critical point.

13 The -- the first response is that although the
14 IRS and Mr. Goldstein have told us that this is a
15 longstanding Government position, the only thing they can
16 actually point to that states that position is the
17 Internal Revenue Manual that dates to 2001. The List of
18 Required Modifications, the LRM, not the IRM, which does
19 go back quite some time earlier, specifically says that it
20 is designed to aid people in drafting or redrafting plans
21 and that the provisions included therein could be useful
22 in some plans, it could be violative in other plans. So
23 that's not authority by which someone can actually look at
24 an IRS publication and say, this is what we have -- the
25 IRS allows.

1 They say that they've issued letters --
2 determinations that they have allowed these in the past,
3 but those are not due deference under -- certainly not
4 under Chevron, probably not even under Skidmore. Those
5 are sort of individual case determinations and they have
6 put none of these in the record.

7 And in any event, under section -- code section
8 7805, the IRS says that those can be wrong, and if they're
9 wrong, all it means is the plan can't be disqualified for
10 having done something wrong. There's -- there are no tax
11 implications. The plan can still owe damages to someone
12 who in fact was hurt by the amendment, but that is itself
13 a small cost in this case.

14 Mr. Goldstein is engaged -- and more to the
15 point, his amici is engaging in hyperbole by saying this
16 is going to bankrupt plans. In the joint appendix at page
17 80, the plan -- the plan's actuary tells us that exactly
18 seven people's benefits were cut off as a result --
19 suspended as a result of this amendment. That's out of
20 5,300 active pensioners, according to the plan's web site
21 at the moment. We're talking less than two-tenths of 1
22 percent of people were, in fact, cut -- suspended because
23 of --

24 QUESTION: But it's not -- if your -- if your
25 position prevails, then I take it the only way an employer

1 can protect himself against hard times is to say for this
2 class of early retirees, no employment. Any employment
3 will result in suspension of benefits, and to say for the
4 ones -- normal retirees are the ones who are restricted
5 only with respect to the same trade, to make the rule as
6 restrictive as possible. I think that your -- your
7 interpretation forces the employer who wants to protect
8 against hard times to take that view. Is that not so?

9 MR. GOSSETT: I -- I disagree, Justice Ginsburg.
10 The -- from the -- the employer's setting up a plan, the
11 essentials of a plan, all they care about is how much
12 money a plan is going to cost them. And it's a -- it's a
13 design decision whether or not you'd rather have a benefit
14 of, say, \$2,000 a month with a narrow -- a narrower
15 suspension rule or \$1,990 a month with a wider suspension
16 rule. Both of those plans cost the employer the same
17 amount of money. There's no -- the -- the details of the
18 number, of course, are -- are questions for actuaries.
19 But the -- the design question is one that can be made
20 completely independent of this. Is it's how important is
21 it to the employer whether people go back to work in other
22 jobs, how important is it to the employees that they can
23 work in specific jobs.

24 The -- while a change in the plan might save the
25 -- the plan money, the initial design decision about how

1 restrictive the rules should be isn't a financial question
2 in the -- in the slightest. And in fact, the fact that
3 the change in the plan -- the -- in the suspension rule,
4 the amendment here saved the plan money, is in fact I
5 think the best evidence of all that the amendment violates
6 the anti-cutback rule. The anti-cutback rule prevents,
7 quote, a decrease --

8 QUESTION: You're -- you're back to the word
9 reduction where I agree with you. But I would have
10 thought that this -- this provision here in 203 really
11 reflects a tension within the union. The union wants to
12 get benefits for its early retirees, and that argues for
13 going back. But the union also wants to reflect -- or
14 protect the wages of the people who are already there.
15 And that means that if there is a recession, what we want
16 to do is stop too many people from going back because that
17 might have a depressing effect on the workers who are
18 there.

19 Now, I put that again because that -- that was
20 how I began to understand what was going on in this
21 provision and I want you to be able to say, no, you're
22 wrong. That isn't what's going on.

23 MR. GOSSETT: What's going on is that --
24 Justice Breyer, is that plans -- that -- that unions and
25 the employers want to prevent cross-subsidization. But

1 there's -- while it is certainly the case that, at least
2 according to this plan and its amici, they have started to
3 rely on this purported right to deal with changing market
4 conditions, they have no authority for doing so. The only
5 thing they can point to is one floor statement by
6 Representative Dent after that provision of ERISA, in
7 fact, had been enacted, saying that there might be some
8 change in market conditions which would affect things.
9 Employers can deal with changing market conditions in the
10 traditional ways. They can pay more or less money.

11 And in any event, the thing missing in that
12 approach to 203 is the foundational principle that ERISA
13 is designed to protect participants. It's not designed to
14 protect plans. It's designed to protect the participants
15 in the plans. That's why it -- that's why the vesting and
16 accrual rules are very explicit. And in fact, turning
17 very briefly to the vesting rules, Mr. --

18 QUESTION: It's certainly designed to protect
19 plans in some respects, the preemption, that sort of
20 thing.

21 MR. GOSSETT: Yes, that's true, but that's
22 largely an indirect way of protecting the plan -- the
23 plans and more indirectly the -- the participants and more
24 indirectly the participants and more indirectly the
25 Federal fisc because, of course, plans are -- are insured

1 by the Pension Benefit Guaranty Board.

2 QUESTION: Am I right about this, that -- that
3 the -- that there is a specific provision in there for the
4 -- for the protection of the plans? I forget what it is,
5 but isn't there a provision that if the plan gets in
6 financial straits, then in fact there -- there can -- can
7 be an amendment that might otherwise might be allowed, an
8 amendment that would -- would save the plan money? Is
9 that correct? Or save the employer money so he can
10 continue to contribute to the plan. Is that correct?

11 MR. GOSSETT: With the -- yes, Justice Souter.
12 With the -- with the consent of the Secretary of Labor,
13 with the disclosure --

14 QUESTION: Okay.

15 MR. GOSSETT: -- to the Secretary of Labor and
16 consent, you can pass an amendment in a plan that --

17 QUESTION: And that would -- that would --

18 MR. GOSSETT: -- reduces benefits.

19 QUESTION: -- be -- that would be a redundancy
20 on -- on the argument that your -- your colleagues on the
21 other side make then I take it. On their position, that
22 wouldn't be necessary.

23 MR. GOSSETT: Yes.

24 QUESTION: Yes.

25 QUESTION: Mr. Gossett, would you just make sure

1 I understand one thing correctly? It's been asked two or
2 three times, but I want to be sure I'm right on it.

3 The amendment that -- the plan provision that
4 Justice Scalia hypothesized which authorized this sort of
5 change -- you agree that if you prevail, that kind of plan
6 provision would be impermissible.

7 MR. GOSSETT: I don't think this Court needs to
8 reach the question because the plan in this case doesn't,
9 in fact, include that provision.

10 QUESTION: No, I understand that.

11 MR. GOSSETT: But I think that that plan
12 provision would not be permissible.

13 QUESTION: Yes, I think that's right. It's
14 still is the same -- it doesn't affect your argument, so I
15 just wanted to be sure about that.

16 MR. GOSSETT: Yes, yes, I agree with that.

17 I -- I want to --

18 QUESTION: Because of what? Just tell me the
19 provision that you think precludes it.

20 MR. GOSSETT: I think that it is on the narrow
21 -- on the narrow end -- it's a technical level -- it's
22 precluded under the IRS's own regulations which point out
23 that you can't have -- you can't change conditions in a
24 way that violates missions. But -- but on the more
25 fundamental level, it violates --

1 QUESTION: I want the statutory provision. I
2 want the statutory provision that makes that no good.
3 204(g).

4 MR. GOSSETT: 204(g).

5 QUESTION: Yes.

6 MR. GOSSETT: 204(g)(1) which says you can't
7 decrease benefits. And while one can come up with a
8 technical reason -- reading of that said that your
9 provision would not violate 204(g)(1), it would read
10 204(g)(1) -- 204(g) out of ERISA because --

11 QUESTION: And this is what we were discussing
12 before and you spell this out in your brief, and you were
13 very candid in saying Justice Scalia's solution wouldn't
14 work.

15 MR. GOSSETT: Yes, Justice Ginsburg.

16 I -- I want -- I wanted to turn quickly to -- to
17 203(c), the -- the amendment provision in the vesting
18 statute that Mr. Goldstein talked about. There are a
19 couple of things to note about that.

20 The first and foremost is probably that it shows
21 that 203(a)(1)(B), the -- the suspension rule that we're
22 talking about, talks about a plan providing for something.
23 In 203(c), they talk about a plan amending the rules. If
24 they had wanted to talk about an amendment in
25 203(a)(1)(B), they could have. They -- they talked about

1 terms amending things elsewhere in the same provision.

2 But more fundamentally, Mr. Goldstein is simply
3 wrong that a plan can retroactively de-vest a participant
4 of benefits that had previously vested. Under
5 203(c)(1)(A), which is on page 4a of the yellow brief, it
6 -- it explains that a plan amendment shall not -- shall be
7 treated as not satisfying 203 if the -- if the amended
8 amount is less than such a non-forfeitable percentage
9 commuted -- computed under the plan without regard to such
10 amendment.

11 So, for example, if a plan participant had
12 earned 20 percent of their -- had a non-forfeitable
13 interest in 20 percent of their accrued benefit and the
14 plan switched from a progression to a -- a cliff vesting,
15 where you got everything in 5 years, they could do that,
16 but they couldn't remove your 20 percent. They could say
17 you don't vest in anything more until the 5-year period,
18 but they couldn't say you lose the 20 percent vested that
19 you already have.

20 QUESTION: I think that they -- that the -- (c)
21 being there shows no more than, that the words, shall
22 provide, which is the beginning of 203, do not mean shall
23 provide in the original plan. They must mean shall
24 provide in the original plan or through permissible
25 amendments because if they meant the original plan only,

1 there would be no safety.

2 MR. GOSSETT: The term provide is not in
3 203(a)(1)(A) and (B), which are the --

4 QUESTION: It says at the very beginning, (A),
5 each plan shall provide that. And as some of -- reading
6 some of what you've written, it's as if you think those
7 words mean in the original plan, and -- and I think they
8 point to (c) to say it can't mean that.

9 MR. GOSSETT: Justice Breyer, the amendment of a
10 plan is authorized under ERISA section 402(b)(3).
11 402(b)(3) is the provision of ERISA that says any plan
12 must include a provision that allows amendments. The
13 amendments that are authorized under 402(b)(3) are then
14 limited by the anti-cutback rule, by the provisions of --
15 of 203, by everything else in ERISA.

16 The -- these specific limitations on amendments,
17 though, are fully -- are all read in para materia. Each
18 -- each limitation on amendments applies to every
19 amendment and there's no provision in 203 that says these
20 amendments are allowed.

21 QUESTION: We're back to the circle. I mean,
22 the -- you're quite right. Every time it talks about the
23 amendments or otherwise, it uses some word like you can't
24 reduce, and the ordinary -- it would have been simpler if
25 they had amended that word reduced, wherever it appears,

1 with the same exception they have here in 203. Then you'd
2 lose definitely and you'd admit it. On the other hand,
3 they didn't put those words in and that gives the strength
4 to your argument.

5 But on the other hand, they say, well, yes, that
6 if in fact they didn't mean to read it in, they're really
7 going to reduce the effectiveness of that same kind of
8 thing over in 203, you see, because they just have it for
9 the forfeitability. They don't have it for the reduction.
10 Really, please, that doesn't make much sense. So that's
11 why, you know, I can't get a firm answer out of the
12 language.

13 MR. GOSSETT: I think that the text of the
14 statute is pretty clearly on my side. The only thing that
15 Mr. Goldstein can point to is this created purpose and
16 supposed longstanding practice of plans to be allowed to
17 change rules retroactively in light of changing market
18 conditions. But though the plans have been doing that,
19 it's the text of the statute that controls and --

20 QUESTION: But you do acknowledge that plans
21 have been making these changes and the IRS has been
22 accepting them for purposes of the employer's tax
23 deductions.

24 MR. GOSSETT: I know, Justice --

25 QUESTION: Is that right?

1 MR. GOSSETT: I know, Justice O'Connor, that
2 they did so in this case. Beyond that, all we have are
3 statements in the IRS's brief and in the National
4 Coordinating Committee's brief, but they're not
5 actually --

6 QUESTION: Now, section 203 refers to normal
7 retirement plans. You take the position that it doesn't
8 cover early retirement.

9 MR. GOSSETT: Section 203(a)(3)(B) doesn't apply
10 to the subsidized portion of early retirement benefits.
11 The -- the -- that's obvious because it is an exception to
12 203(a) which says that your normal retirement is non-
13 forfeitable.

14 And the Government has taken this position as
15 well. This is not something that we created. In the
16 regulation -- this is in 29 C.F.R. 2530.203. The
17 Government explains that a plan can provide that early
18 retirement benefits are suspended for any reason -- for
19 any reemployment because 203(a)(3)(B) is defining the
20 universe of possible suspension rules for normal
21 retirement benefits, but it doesn't -- doesn't limit the
22 universe of suspension rules for early retirement
23 benefits.

24 And in fact, in September -- on the same
25 amendment that applied to Messrs. Heinz and Schmitt, that

1 -- in that same amendment, the plan provided that for
2 benefits accrued after September 30th, 1998, but only sort
3 of prospective benefits, not retroactive benefits, any
4 post-retirement reemployment would lead to those benefits
5 being suspended.

6 They -- and -- and this actually follows from
7 the -- again, from the IRS's own position. In the
8 Internal Revenue Manual, the IRS says you can have a
9 provision saying that any work is -- is suspensive, but
10 you can only do that prospectively because applying the --
11 such a changed rule retroactively would decrease their
12 benefits.

13 But to the extent that you can have a rule that
14 says any work is suspensive, that means that 203(a)(3)(B)
15 isn't -- just isn't applicable here. It's not what
16 determines whether or not someone -- the rules that a plan
17 can have for early retirement benefits. A plan can have
18 a --

19 QUESTION: Was that distinction made in the
20 Seventh Circuit between the early retirement benefits with
21 regard to the application of 203(a)?

22 MR. GOSSETT: Sorry.

23 QUESTION: Was that -- was that an argument that
24 you presented to the Seventh Circuit distinguishing the
25 early retirements benefits from normal retirement benefits

1 for 203(a) purposes? I thought it was -- that it was
2 acknowledged in the Seventh Circuit that 203(a) applied to
3 the early retirement benefits as well as the normal --
4 normal retirement benefits.

5 MR. GOSSETT: 203(a) applies to early retirement
6 benefits to the extent that they are the actuarial
7 equivalent, the net present -- the financial equivalent of
8 normal retirement benefits, but not to the subsidized
9 portion of -- of them. So -- so I think the answer is
10 yes, we did say that in -- in the lower court, but I'm not
11 100 percent sure, Justice Ginsburg.

12 The -- one other point I wanted to -- to go
13 over. Though the plan argues that 204(g) doesn't apply to
14 this change -- they say that the change only applies to a
15 reduction in the value of a life annuity -- that's not the
16 statutory term. The -- the statutory definition of an
17 accrued benefit, which is in ERISA section 323, is the
18 individual's accrued benefit determined under the plan.
19 It's whatever the plan promises to the participant that is
20 protected by the plan. It's --

21 QUESTION: You -- you say that 204(g) prevents
22 the plan at the outset from rendering itself amendable,
23 but if you agreed with them that 204(g) does not prevent
24 the later amendment, it would also be true that 204(g)
25 does not prevent the employer from the outset at saying

1 that the retirement benefits are amendable. Isn't that
2 right?

3 MR. GOSSETT: Justice Scalia, it allows an --
4 you can make an amendment --

5 QUESTION: I was making the point earlier that
6 even if we find for you, the employer would -- would have
7 a way of -- of solving the problem, which is simply at the
8 outset to set forth. Now, it's very difficult for them to
9 respond to that argument when they say that 204(g) does
10 not stop -- does -- does not prevent a later change in the
11 plan. How could it possibly prevent a later change but --
12 not prevent a later change, but prevent a change at the
13 outset and announce that you're going to make a change?

14 MR. GOSSETT: Well, it clearly prevents the
15 later change, which is what is at issue here. I think it
16 also prevents the earlier change because I think any other
17 reading of the anti-cutback rule reads it out of the
18 statute, but I don't think the Court needs to address that
19 question in this case.

20 QUESTION: But another way of putting Justice
21 Scalia's point is if they're right, it's surprising that
22 they didn't make the point clearer in their plans because
23 it would have been legal to do so.

24 MR. GOSSETT: I don't think -- they didn't make
25 this argument below, to the best of my knowledge. They

1 made this argument that --

2 QUESTION: But I mean if their basic theory of
3 the 204(g) is correct, then all the plans could have
4 solved this problem by saying so expressly so nobody would
5 have been fooled as your clients were. They could have
6 said in the plan itself, we retain the right to do this.
7 They say it's just there by statute, but the plan is
8 somewhat ambiguous, and they could have said so expressly
9 if they're right and you're wrong.

10 MR. GOSSETT: Yes.

11 QUESTION: They couldn't have done it if you're
12 right and they're wrong.

13 MR. GOSSETT: That's exactly right, Justice
14 Stevens. But of course, they didn't.

15 The -- the main provision on amendments in the
16 plan, which is the provision at page 50 of the joint
17 appendix, says that no amendment can decrease the accrued
18 value. They elsewhere in the plan talk about notifying
19 participants of changes to the plan and discussed that
20 there could be a change, but that change -- that doesn't
21 say that there can be a retroactive change. There could
22 have been a prospective change that loosened the rules.
23 There could also have been a prospective change that
24 applied to newly accrued benefits because by the terms of
25 that provision, the --

1 QUESTION: Thank you, Mr. -- thank you, Mr.
2 Gossett.

3 Mr. Goldstein, you have 2 minutes remaining.

4 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

5 ON BEHALF OF THE PETITIONER

6 MR. GOLDSTEIN: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 I have four points. The first deals what kind
9 of promises we can make to participants that they can
10 enforce. The promise can only go in one direction. That
11 is, if we promise them we will not change the suspension
12 rules, if they -- trustees put that provision in and the
13 employees and the participants rely on it, we -- that --
14 to -- to change that would violate the plan and they would
15 have a right under 502 to enforce it.

16 But, Justice Scalia, there is no way that
17 there's a middle ground under which the plans flag for the
18 participants, hey, this is open to a change because 204(g)
19 -- if they win, they'll win under 204(g). 204(g) is
20 categorical. You can't reduce benefits even if you say
21 you're going to. It's just no way you can do it. And
22 therefore, the only middle ground is under our provision.
23 If participants and the trustees want a plan provision,
24 making it a concrete promise, we won't change the rules.
25 If that's in the plan, it would be enforceable against us.

1 But it isn't.

2 Second --

3 QUESTION: No, but your plan could have made
4 clear what you say the law otherwise authorizes.

5 MR. GOLDSTEIN: It could have, although I would
6 say that the provisions cited by the Assistant to the
7 Solicitor General talks about telling a person who is in
8 retirement about a material change in the suspension
9 rules, and that's -- that's pretty clear to my mind. But
10 it's true. It could have gone -- we could have been even
11 more clear, but this is a right, a statutory right, that
12 we have.

13 Justice O'Connor, Justice Ginsburg, what does
14 203 cover? It covers a normal retirement benefit, and
15 usually what we think of as an early retirement benefit,
16 that is, the unsubsidized portion of an -- of a early
17 retirement benefit.

18 The third is it is -- Justice Breyer is
19 absolutely right about the purpose of this provision. We
20 want to be able to adjust to current labor conditions.
21 And Justice Souter, the statute recognizes that. 203(a)
22 has a special rule for multiemployer plans. They cover
23 things like construction and labor where the markets
24 change a lot, and they have a much narrower provision in
25 203 for single employer plans.

1 But ultimately, I think that this is fairly
2 characterized as ambiguous. The agency here has an
3 enormous amount of experience in balancing the purposes of
4 these different statutes and knowing what's different
5 between a decrease and a suspension.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Goldstein.

8 The case is submitted.

9 (Whereupon, at 11:07 a.m., the case in the
10 above-entitled matter was submitted.)

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